

SERVED: July 31, 1995

NTSB Order No. EA-4380

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of July, 1995

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
v.)	Docket Nos. SE-9248
)	SE-9249
EUGENE A. BIELECKI,)	SE-9244
JOSEPH CARPENTER,)	SE-9246
EDWARD DAHLIN,)	SE-9245
GARY P. HERDEN,)	SE-9247
DANIEL J. HOGBERG, and)	
CHARLES A. NICHOLLS,)	
Respondents.)	

ORDER GRANTING RECONSIDERATION

Respondents, individually and primarily pro se, seek reconsideration of our order, NTSB Order EA-4222, served August 3, 1994. In that order, we affirmed revocation of their airline transport pilot certificates for various regulatory violations involving deficient training and competency checks and related inaccurate recordkeeping. The Administrator opposes reconsideration.

In imposing the sanction of revocation, we reversed the initial decision of the law judge, and we did so on appeal from the Administrator. Although respondents had initially filed a notice of appeal, they withdrew it and did not file an appeal brief. While petitioners may consider the result a harsh one, precedent and logic prohibit our "re"consideration of arguments petitioners failed to make on appeal of the law judge's decision.

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See Administrator v. Hamilton, NTSB Order EA-3583 (1992).¹ Accordingly, issues such as credibility and adequacy of proof of intentional falsification are not properly before us. New evidence attached to various of respondents' petitions may also not be considered, as there is no reason offered why this information could not have been presented to us at an earlier stage of this proceeding. See 49 C.F.R. 821.50. The circumstances of this case and its present posture² persuade us, however, to reevaluate the propriety of revoking respondents' certificates now and to grant reconsideration as to sanction, an issue respondents properly may raise.

Despite our contrary pronouncements (see our prior decision at 5), we recognize that a pending enforcement proceeding, especially one carrying the prospect of certificate revocation, has the potential to undermine an airman's ability to retain or obtain aviation-related positions. We have stated our unwillingness to consider this fact in our judgments on sanction in air safety cases involving certificate revocation. See Administrator v. Gaub, NTSB Order EA-3614 (1992) at 8. Compare Administrator v. Colvig, 4 NTSB 202 (1982) (factor considered but found not compelling to reduce sanction in certificate suspension proceeding).

In this unique case, however, we believe that fairness requires dismissal of the charges, and we also believe that

¹There, we stated (slip opinion at 2):

In Administrator v. Lambert, 4 NTSB 1373 (1984), respondent failed to file a brief in opposition to the initial decision and, as a result, his appeal was dismissed. In his petition for reconsideration, respondent advanced arguments on the merits, rather than challenging the Board's dismissal of his appeal. We held that he could not use a petition for reconsideration to raise challenges that should have been, but were not, made on appeal.

We note as well that, at the time respondents filed the notice of appeal, they were represented by counsel and that, while counsel may have become ill during the pendency of the case, respondents never sought an extension of time to perfect an appeal of the initial decision and never advised the Board that withdrawal of the appeal was due to any cause for which the Board could be of assistance or provide relief.

²The details of this case are thoroughly explained in the initial decision and our decision on appeal. In short, a considerable part of the delay in reaching a final decision here was the result of the failure of the law judge who heard the case to issue an initial decision. See Initial decision at 3-4.

dismissal is not inconsistent with our statutory obligations. Our task, in reviewing the Administrator's enforcement orders, is to "amend, modify, or reverse the order" when we find "that safety in air commerce or air transportation and the public interest do not require affirmation of the order." 49 U.S.C. 44709(d). The events that gave rise to the instant orders occurred in 1986 and 1987. Since then, and in the context of defending themselves in this proceeding, respondents have, we are confident, considerably expanded their knowledge of their obligations under the Federal Aviation Regulations. Thus, we expect that safety in air commerce or air transportation will not be furthered by revoking respondents' certificates now. It has now been almost 10 years, with more than 2 of those years' delay (i.e., the period during which the hearing law judge failed to issue an initial decision) having absolutely no legitimate basis. Had this case proceeded under the timetable more typical at the time, we would expect that respondents would have been permitted by now to requalify for their certificates.³ Accordingly, we cannot find in this case that the public interest requires more than what respondents have undergone.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' petitions for reconsideration are granted in part; and
2. The Administrator's orders are affirmed to the extent they allege the regulatory violations we have affirmed, but are vacated to the extent they contain sanction provisions.

HALL, Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above order. FRANCIS, Vice Chairman, did not concur and submitted the following dissenting statement.

³Revocation does not typically imply that a respondent may never obtain a certificate again. Individuals whose certificates have been revoked may apply to requalify after 1 year. The FAA may deny such requests, but most commonly grants them.